Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of	)	
	)	
Federal-State Joint Board on Universal Service	)	WC Docket No. 96-45
	)	
Petition of U. S. Satellite Corporation for Declaratory Ruling	)	

PETITION FOR DECLARATORY RULING, OR, IN THE ALTERNATIVE, FOR WAIVER

Pursuant to Sections 1.2 and 1.3 of the Federal Communication Commission's ("FCC" or "Commission") Rules, 47 C.F.R. §§1.2, 1.3, U.S. Satellite Corporation ("USSC") hereby respectfully requests that the Commission issue a declaratory ruling clarifying that the self-provider revenues of USSC should be excluded from the revenue base used to calculate payments to the Universal Service Fund ("USF"). In the alternative, USSC requests that the Commission find good cause to extend a waiver to USSC allowing it to exempt such revenues when calculating its USF payment obligations.

BACKGROUND

USSC is a relatively small satellite communications provider that holds five FCC common-carrier, earth station licenses.[1] USSC is a wholly-owned subsidiary of SUPERVALU Inc. ("Supervalu"), and primarily provides its services to Supervalu and its retail outlets. This service is an integrated VSAT-based, backup to terrestrial data services system, which includes managing the deployment, installation and maintenance of remote

[1] USSC holds earth station licenses EO30277, E2595, E870499, E900470 and E900471. It also holds five microwave wireless licenses that are all part of a point-to-point 11 GHz Analog Video microwave between USSC in Murray, UT and various points within line-of sight. This is an entirely intrastate service.

hardware and configurations; acting as a help desk for ongoing operational issues of the systems; integrating the USSC VSAT terminal into the customer's primary network; and transmitting data by means of USSC's VSAT system. In exchange for this service, Supervalu pays USSC a fee under an intra-company agreement that produces most of USSC's interstate telecommunications revenues.

USSC also provides occasional video interstate satellite uplink and downlink services and VSAT-based integrated data services to unaffiliated third parties, including to retail outlets that are not owned and operated by Supervalu. Such services to unrelated third parties, however, generate a proportionately small fraction of its interstate telecommunications revenues. USSC has chosen to remain classified as a common-carrier.[2] Although classified as a common carrier, USSC offers its third party interstate telecommunications services primarily on a non-discriminatory contract-by-contract basis to a select group of enterprise customers. Finally, a minimal amount of USSC's revenues is received from a small number of customers that acquire occasional or spot services on the basis of USSC's published price list.

The Instructions to the Telecommunications Reporting Worksheet, Form 499-A ("Form 499-A Instructions") create a "loophole" wherein it appears that only a small number of carriers are required to report self-provider revenues. The Form 499-A Instructions provide that non-common carriers "that provide services only to themselves and to commonly-owned affiliates need not file" the FCC Form 499-A.[3] Therefore, a non-common

[2] The FCC has determined that it will provide all U.S.-licensed fixed satellite service operators a choice of providing common carrier or non-common carrier operations. *See Amendment to the Commission's Regulatory Policies Governing Domestic Fixed Satellites and Separate International Satellite Systems*, FCC 96-15, 11 FCC Rcd No. 5, para. 49 (rel. Jan. 22, 1996). The FCC has allowed licensees, upon a letter filing to the Commission and without prior Commission approval, to change their status from a provider of common carriage services to a provider of satellite services on a non-common carrier basis. *See* id. at para. 50.

[3] *See* 2010 Form 499-A Instructions, page 8, section II.A.3.

carrier that receives revenues from providing service only to itself or to a commonly-owned affiliate is not required to file a FCC Form 499-A at all. Further, the Form 499-A Instructions provide that "an entity is not required to impute or report revenues for services provided to itself or to wholly owned affiliates unless: 1) it is required to record such revenues for some other federal or state regulatory purpose; or 2) the filer is providing service to an affiliate for resale and the affiliate is not a direct universal service contributor."[4] This additional instruction on self-provider revenue is very unclear. It is uncertain what is meant by the requirement that an entity may have to "record such revenues for some other federal or state regulatory purpose." Added to the ambiguity is the uncertainty if self-provider revenues are to be reported into other regulatory support mechanisms such as the TRS fund, the NANPA fund, and the LNP fund.

By implication, USSC, *because it is not exempt from other contribution funds* such as the TRS fund, the NANPA fund, and the LNP fund,[5] must report self-provider revenues because the first exception from reporting self-provider revenues recited in the instructions above applies. It must be the case, however, that some entities are not subject to this same exception and therefore are not reporting self-provider revenues. There are no Commission Rules on reporting self-provider revenues for USF contribution purposes and, therefore, no further authoritative guidance to clarify this seemingly arbitrary effect of the Form 499-A Instructions.

Based on USSC's understanding of the Form 499-A Instructions, therefore, USSC has reported on its FCC Form 499s interstate telecommunications revenue that it receives from providing services to third parties as well as its self-provider telecommunications revenues as revenues subject to the USF contribution factor. Of the eligible telecommunications revenues

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[4] *See id.* at page 20. Supervalu is the end user of services acquired from USSC; it does not resell these services.

[5] 47 CFR §§ 52.17, 52.32, 64.604.

reported in its 2010 FCC Form 499-A, was from telecommunications revenues for services that USSC provided to Supervalu and its retail stores, whereas only was from revenue that USSC received from providing interstate telecommunications services to retail facilities that are not owned or operated by Supervalu and to other third parties. In its 2011 FCC Form 499-A, USSC will have to report in self-provider revenues as eligible interstate telecommunications revenues, and only in eligible revenue received from non-affiliated third parties. This means that, in 2009, well over half -- 66% -- of USSC's USF contribution base was self-provider revenue, and in 2010, that number will be up to 73%.

As a result of the foregoing, USSC is required to pay an extraordinary proportion of its interstate telecommunications revenues that it receives from third-party customers into the USF. USSC's total assessed USF contribution was approximately in 2009 and will be approximately in 2010. This means that over 33% of its total interstate telecommunications revenues received from third parties in 2009 was paid into the USF, and over 59% of its 2010 total interstate revenues from third parties will be paid into the Fund.

The Commission should clarify that it did not intend to assess USF contributions on the interstate telecommunications "revenues" that USSC generates from providing service to its commonly-owned affiliates. USSC devotes over half of its services to its commonly-owned affiliates and therefore is primarily a self-provider of service, and acts only secondarily as a telecommunications service provider to third-parties. The result of not clarifying the loophole in the Form 499-A for USSC is a contribution assessment method on USSC that is inequitable, discriminatory, and not in the public interest. In the alternative, the

Commission should find good cause to waive the requirement that USSC include its disproportionately large amount of self-provider revenues in its USF payment obligations.[6]

ARGUMENT

Although the Commission has discretion to determine USF contribution rules and requirements, the enabling statue places certain limits on this administrative latitude. Specifically, Section 254(d) of the Communications Act states that interstate telecommunications carriers shall contribute to the USF only on an "equitable and nondiscriminatory basis."[7] The Form 499-A Instructions regarding the reporting of self-provider revenue leads to an inequitable and discriminatory result because they sabotage the ability of USSC, which primarily provides service to its commonly-owned affiliates, to compete in the open market with other providers that do not also generate self-provider "revenue."

A. Requiring USSC to Report Self-Provider Revenue Misinterprets the Commission's Original Self-Provider Exemption.

1. The Commission recognized that self-provider "revenue" should not be assessed for USF.

The source of the non-common carrier self-provider exemption in the Form 499-A Instructions is the Commission's 1997 *Universal Service Order,* where the Commission held:

> "Private network operators that serve only their internal needs do not lease excess capacity to others and do not charge others for use of their network. Thus, we find that they have not

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[6] The Commission may exercise its discretion to waive a rule where the particular facts make strict compliance inconsistent with the public interest. *Northeast Cellular Telephone Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990). In addition, the Commission may take into account considerations of hardship, equity, and the effective implementation of public policy on an individual basis. Waiver of the Commission's Rules is appropriate when special circumstances warrant a deviation from the general rule, the deviation promotes equity, and such a deviation will serve the public interest. USSC submits that such a deviation will serve the public interest in this instance. *WAIT Radio v. FCC*, 418 F.2d 1153, 1159 (D.C. Cir. 1969), cert denied, 409 U.S. 1027 (1972).

[7] 47 U.S.C. § 254(d).

> structured their business around the provision of telecommunications to others"[8]

In so doing the Commission explained that an important principle in deciding if a class of telecommunications revenue is properly assessed USF payment obligations is if the telecommunications service is being providing *to others*. Hence, if a carrier does not provide telecommunications service *to others*, it should not be assessed USF.

The Commission went on to explain that its decision to exclude non-common carrier self-provider revenue from the USF contribution base was further supported by the obvious distinction that these service providers "do not derive revenues from the provision of services to themselves."[9] The Commission recognized that, if it were to include entities that provide service to themselves into the USF contribution base, it would need to assess "a special *non-revenue based* contribution" on such providers that it had not, and has not, established.[10]

For the sake of equity, the Commission ultimately determined that private service providers that serve their own internal needs *in addition to* serving the telecommunications needs of others must contribute to the USF. The Commission found that these carriers "compete[] with common carriers, and the principle of competitive neutrality dictates that we should secure contributions from it as well as its competitors."[11] The Commission explained that:

> "[t]he public interest requires ... private service providers that offer interstate telecommunications to others for a fee

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[8] *Universal Service, FCC 97-157, 12 FCC Rcd 8776,* at para. 799 (May 8, 1997) (*"Universal Service Order*").

[9] *Id.,* para. 799.

[10] *See id.* (emphasis added). Based on the discussion of this provision in the *Universal Service Order*, it appears that there was little controversy regarding the self-provider exemption. Unlike in other decision paragraphs, the Commission did not discuss any comments from any third parties or address any arguments as to why self-providers *should* contribute to the USF fund.

[11] *See Universal Service Order*, para. 796.

> ...contribute...in the same manner as carriers that provide 'interstate telecommunications services' because this approach reduces the possibility that carriers with universal service obligations will compete directly with carriers without such obligations."[12]

The Commission's holding did not specify, however, whether the operator's contributions should be based on *all* of its interstate telecommunications revenues or *only on those received from third parties*. The only interpretation that is consistent with the Commission's initial finding that self-provider revenue should be excluded because it is not being provided to "others" and therefore is not generating "revenue" for the carrier, is that providers should be assessed on revenues from third parties only. This interpretation also supports the Commission's stated goal of competitive neutrality.

2. The misinterpretation of the Commission's original self-provider exemption leads to inequitable and discriminatory results.

The Commission's self-provider rules as stated in the Form 499-A Instructions turns the Commission's stated goal of competitive neutrality on its head. The Commission had explained that the point of including non-common carriers that generate third party revenue into the USF contribution base was so that the carriers "contribute to federal universal service *on the same basis as telecommunications carriers.*"[13] As the Form 499-A Instructions apply to USSC, however, it is being required to contribute to the USF for revenues received from third parties on a disproportionate and, therefore, discriminatory basis. Although USSC is technically receiving revenues from its parent organization under the parties' intra-company agreement, this transfer of funds between wholly owned affiliates does not qualify in

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[12] *Id.* at 795.

[13] *See id.* at 796. In so holding, the Commission emphasized that it did not regard whether the carrier has structured its operations as common carrier or private in nature to be determinative, but rather on whether it provides telecommunications competition to common carriers. para. 795-96

substance as the offering of services "to others for a fee."[14] The result, therefore, is that USSC must pay 58% of its interstate telecommunications revenues that it actually does offer "to others for a fee" into the USF. As such, USSC is effectively placed at a competitive disadvantage in competing for unaffiliated customers in relation to other providers that are assessed the normal USF contribution factor on all of their third-party interstate revenues. Clearly USSC is not being treated "on the same basis as [other] telecommunications carriers,"[15] but is being treated discriminatorily.

The Form 499-A Instructions also discriminate unreasonably between USSC, which provides service to commonly-owned affiliates in consideration for an intra-company transfer of funds, and USSC's competitors that do not. As USSC's parent, Supervalu's payments to its subsidiary for telecommunications services are netted out in the parent's consolidated financial statement and tax returns. The intra-company payments are, therefore, little more than a book-keeping function within the Supervalu corporate group. Yet, if USSC did not charge its parent for the VSAT integrator services it provides, there would be no recorded revenues for such services on which a USF contribution could be assessed. This distinction was never anticipated in the Commission's original explanation of the self-provider exemption, and it does not represent a legitimate basis to discriminate among differing self-provider business models.

Finally, the misinterpretation of the Commission's self-provider exemption in the Form 499-A Instructions also discriminates against USSC for operating as a common carrier. Yet the Commission's 1997 *Universal Service Order* held that the classification of a provider as a common carrier or private operator should effect no difference in how it is treated for

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[14] *See Universal Service Order*, para. 795 (holding that a private service provider must contribute to the USF to the extent that it provides service to others for a fee).

[15] *See id.* at para 796.

USF contribution purposes.[16] Instead, the application of the contribution rules was meant to ensure competitive neutrality among all providers of services in competition with common carriers. USSC is not asking the Commission for special treatment. Instead, it is requesting to have its revenues received from unaffiliated third parties assessed on a basis equal to its competitors who primarily target third-party customers.

B. Analogous Law Supports Excluding USSC's Self-Provider Revenue from its USF Fund Payment Obligations.

By having to include its self-provider revenue in its USF payment obligations, USSC is effectively obligated to pay into the USF more than half of the interstate revenue that it receives from unaffiliated third parties in 2010. Moreover, there are no safeguards on the Commission's self-provider revenue contribution rules to ensure that USSC will not in some future reporting period be required to pay more than its third-party interstate telecommunications revenues into the USF fund if the percentage of USSC's third-party revenues relative to that received from its parent organization continues to decline. USSC could, therefore, find itself in a position in which it is losing money as a result of its provision of service to unaffiliated third parties.

A similar inequity in the application of USF contribution rules was previously found to be in violation of the Communication Act's "equitable and nondiscriminatory" language.[17] In *TOPUC,* a satellite carrier, COMSAT, whose revenues were predominately from the provision of international services, challenged the unlimited inclusion of international revenues into the USF contribution base. COMSAT argued that it was being treated unfairly by the Commission rule that required carriers, without exception, to include both their interstate and international revenues into the USF contribution base. Because COMSAT

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[16] *See id.*

[17] *Texas Office of Public Utility Counsel v. FCC*, 183 F.3d 393 (5th Cir. 1999) ("*TOPUC*").

disproportionately provided international service, it could be forced to pay more in universal service contributions than it could generate in interstate revenues.[18]

The Fifth Circuit Court of Appeals found that placing such a prohibitive cost on COMSAT and similarly situated carriers conflicted with the Commission's duty to make the USF contribution rules equitable.[19] The Court found that the Commission offered "no reasonable explanation of how this outcome, which will require companies such as COMSAT to incur a loss to participate in interstate service, satisfies the statute's "equitable and nondiscriminatory' language"[20] The Court also found the rule to be discriminatory because it harmed some international carriers more than others.[21] The rule was remanded, and the Commission amended its rules to provide for equity and nondiscrimination in its inclusion of international revenues into the USF contribution base.[22]

Similarly, the application of the Form 499-A Instructions to USSC could result in it incurring a loss on its provision of services to unaffiliated third parties. With USSC already contributing 58% of its third-party revenue into the USF, this result is not just speculative; it could occur in any reporting year. The affect of the rule interpretation also demonstrates that some self-providers pay a higher percentage of their third-party revenues in USF contributions than do others.

The Commission has made no reasonable explanation of how including the primarily self-provider revenues of USSC in its USF contribution base is in the public interest. On the contrary, in its original order interpreting Section 254 of the Act, the Commission concluded

[18] *See id.* at 433.

[19] *See id.* at 434-35.

[20] *See id.*

[21] *See id.*

[22] *See* 47 C.F.R. §§ 54.706, 54.709. Carriers whose international revenues exceed eighty-eight percent of total revenues can exclude those revenues from USF payment calculations.

that revenues a carrier receives solely from itself should be *excluded* from the USF contribution requirement. This holding is consistent with Section 54.706 of the Commission's Rules which states that entities that "provide interstate telecommunications *to the public*, or to such classes of users as to be effectively available *to the public*" must contribute to the USF fund.[23] Commonly-owned affiliates are clearly not the same as the public. The Commission has offered no support as to why USSC should report its self-provider revenues, particularly when those revenues constitute the majority of its interstate revenues.

As in the rule challenged in *TOPUC*, the Commission's inclusion-without-exception rule as applied to USSC produces inequitable and discriminatory results in violation of the "equitable and nondiscriminatory" requirements under the governing statute, and these inequities "cannot be dismissed by the agency as a consequence of its administrative discretion."[24]

C. It is in the Public Interest to Exclude USSC's Self-Provider Revenue from its USF Payment Obligations.

Excluding USSC's self-reporting revenue from USF payment obligations would serve the public interest because it would ensure that it remains a viable competitor in the open market. The Commission has frequently recognized the public interest value in preserving and promoting a healthy competitive telecommunications marketplace.[25] Requiring USSC to contribute to the USF based on self-provider revenues threatens its ability to generate enough revenue as a service provider to the public to cover its burdensome USF contribution

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[23] *See* 47 C.F.R. § 54.706 (emphasis added).

[24] *TOPUC*, 183 F.3d at 434-35.

[25] *See, e.g., Low-Volume, Long Distance Users,* 15 FCC Rcd. 6298, ¶ 11 (1999) ("the Commission's goal is to bring to all Americans the benefit of a robust and competitive communications marketplace" because "competition has created greater choice and value for many consumers."); *Federal-State Joint Board on Universal Service*, 12 FCC Rcd. 87, ¶ 2 (1996) (noting goal of establishing rules that will enhance rather than distort competition consistent with the procompetitive goals of the 1996 Act).

requirements. Clarifying that these revenues are not to be assessed will level the playing field and enable USSC to remain a viable competitor in the marketplace, and thus will serve the public interest.

In addition, when deciding to require private service providers to contribute to the USF fund, the Commission noted that its decision was based on the principle that it "did not want contribution obligations to shape business decisions, and [we] do not want to discourage carriers from continuing to offer their common carrier services."[26] Granting the request herein, therefore, will serve to promote the Commission's own stated policies. As the rules apply to USSC, it is harmed by offering common carrier services to the public as a direct result of its disproportionate USF obligations. As such it must seriously consider the value of retaining this status. Clarifying that self-provider revenues should not be included in USSC's USF payment obligations will promote the Commission's own policy objectives by not allowing USF contribution obligations to shape USSC's competitive business plan, and thus will protect USSC's third-party customers that currently rely on the service that they acquire from USSC.

CONCLUSION

In light of the unequal and discriminatory effect that including its self-provider revenues has on USSC's ability to compete in the open marketplace, and to ensure that USSC will not pay more into the USF fund than it can generate in providing telecommunications services to others, the Commission should clarify that USSC's self-provider revenues were not meant to be included in USF payment obligations. In the alternative, the Commission should find that the special circumstances of USSC's disproportionate reliance on revenues received from its wholly owned affiliate warrants a deviation from USAC's application of the

[26] *Universal Service Order*, para. 795.

Form 499-A Instructions and grant it a waiver from reporting its self-provider revenues as part of its USF payment obligations.

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